# Wong Sin Chong & Anor v Bhagwan Singh & Anor

SUPREME COURT (KOTA BHARU) — CIVIL APPEAL NO 02-572 OF 1991
HARUN HASHIM, MOHAMED AZMI AND MOHAMED DZAIDDIN SCJJ
8 OCTOBER 1993

***Evidence*** *— Calling of witness by defence — Subpoena — Right to call witness — Whether oppression or abuse of process if no useful result would be obtained by attendance of witness — Onus on party issuing subpoena to show materiality of witness*

***Civil Procedure*** *— Subpoena — Setting aside — Abuse of process — Person subpoenaed had no personal knowledge of subject matter*

***Civil Procedure*** *— Amendment — Defence — Delay — Subpoena not relevant to defence — Amendment would cause prejudice which cannot be compensated by costs*

***Civil Procedure*** *— Subpoena — Setting aside — Delay — Whether delay in issuing subpoena oppressive or male fide*

***Civil Procedure*** *— Subpoena — Setting aside — Failure to identify documents required to be produced — Refusal of issuer of subpoena to include all relevant documents — Whether mala fide*

***Legal Profession*** *— Duty of solicitor — Duty to do justice greater than duty to represent client*

***Civil Procedure*** *— Parties — Joinder of parties — Party to be blamed should be added as party to proceedings and not merely called as witness*

The respondents were the former solicitors for the appellants ('the Wongs') in a civil suit. At the hearing, neither the Wongs nor the respondents was present, resulting in default judgment being entered against the Wongs. Mr Bhagwan Singh (the first respondent), then applied to set aside the default judgment. Subsequently, with the consent of the respondents, the Wongs engaged Messrs Wrigglesworth & Co in place of the respondents. The application to set aside the judgment was heard together with a fresh application by the Wongs to extend time, since the application to set aside had been filed outside the seven days from the service of the order of default judgment. Both the applications were dismissed. An appeal to the Federal Court by Dato' Wrigglesworth was also dismissed, ending any hope of the Wongs to set aside the default judgment. The Wongs instructed Dato' Wrigglesworth to commence action against the respondents for professional negligence. After the hearing of the suit had commenced for two days, the first respondent issued a writ of subpoena for Dato' Wrigglesworth to give oral evidence for the defence and to produce documents. The Wongs applied to have the subpoena set aside on the grounds that: (i) Dato' Wrigglesworth did not have any personal knowledge relating to the professional negligence case and could not give any material evidence; (ii) the subpoena had been

made mala fide and was an abuse of the court process, ie to prevent Dato' Wrigglesworth from continuing as their counsel; and (iii) a change of counsel at that late juncture would be oppressive.

The Wongs' application to set aside the subpoena was dismissed with costs and they have appealed on the ground that the judge's refusal to set aside the subpoena had effectively prevented Dato' Wrigglesworth from continuing to be their counsel in the part-heard case. The issues before the court were: (i) the materiality of the evidence to be elicited by the defence from Dato' Wrigglesworth; (ii) the issue of oppression since Dato' Wrigglesworth had been a long-standing solicitor and counsel for the Wongs; and (iii) abuse of privilege or process, in the light of the delay in issuing the subpoena after the hearing had commenced for two days.

**Held**, allowing the appeal:

(1) The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. Where no useful result would be obtained by the attendance of a witness, the subpoena should be refused.

(2) The onus is on the party issuing the subpoena to show the materiality of the witness, in that it outweighs any oppression that may be caused to the party objecting. Thus, it was for the respondents to satisfy the court, on balance, of the materiality of the evidence of Dato' Wrigglesworth as their witness, before the Wongs could be deprived of their right to the services of Dato' Wrigglesworth. Even if it was permissible for Dato' Wrigglesworth, notwithstanding the subpoena, to continue as counsel for the Wongs, the court must be satisfied that Dato' Wrigglesworth was in a position to give material evidence before he could be ordered to give evidence for the opposite side.

(3) The only matter on which Dato' Wrigglesworth could possibly have personal knowledge of and therefore could testify to was on evidence of collateral facts not directly relevant to the entry of the default judgment.

(4) There was no plea in the statement of defence to indicate that Dato' Wrigglesworth was either wholly or partly to blame for any of the particulars of negligence. It is trite law that parties are bound by their pleadings and it was apparent that the subpoena had nothing to do with the defence as pleaded. Amending the defence now, after a lapse of seven years and after the case had been partly heard, would prejudice the Wongs which cannot be compensated by costs.

(5) As it was not part of the defence that Dato' Wrigglesworth was guilty of any contributory negligence, the trial judge ought to have come to the conclusion that, on the pleadings, the respondents had failed to satisfy the court on the materiality of the evidence that Dato' Wrigglesworth could possibly offer to the defence. Save for annoyance and confrontation, no useful purpose would

A be obtained by the attendance of Dato' Wrigglesworth as a witness.
(6) There was no explanation for the delay in the issue of the subpoena, and having regard to its timing, there could be no doubt, on balance, that it was an oppressive subpoena, with a mala fide motive of depriving the Wongs of the services of Dato' Wrigglesworth in the middle of the hearing. It was an abuse of process and should be set aside.
(7) The failure of the subpoena to identify the documents to be produced, after the first respondent had withheld consent to the inclusion of all relevant documents in the agreed bundle of documents, notwithstanding the second respondent's agreement to such inclusion, did not assist the first respondent at all on the issue of bona fide.

**Per curiam**:
(1) The duty of a solicitor to do justice, if he is a material witness to a case, is of greater paramount than his duty to represent a client.
(2) If Dato' Wrigglesworth were to be blamed wholly or partly for the professional negligence alleged by the Wongs, then he should properly be joined as a party in the proceedings and not merely called as a witness.

**[Bahasa Malaysia summary**

Responden adalah bekas peguamcara untuk perayu ('Wongs') dalam suatu tindakan sivil. Pada perbicaraan itu, Wongs dan responden tidak hadir, mengakibatkan penghakiman ingkar dimasukkan terhadap Wongs. Encik Bhagwan Singh (responden pertama), kemudiannya telah memohon untuk mengetepikan penghakiman ingkar itu. Kemudiannya, dengan persetujuan responden, Wongs telah mengguna khidmat Tetuan Wrigglesworth & Co untuk menggantikan responden. Permohonan untuk mengetepikan penghakiman itu telah didengar bersama dengan suatu permohonan baru oleh Wongs untuk melanjutkan masa, kerana permohonan untuk mengetepikan penghakiman itu telah difailkan di luar had masa, iaitu tujuh hari dari tarikh penyampaian perintah penghakiman ingkar. Kedua-dua permohonan itu telah ditolak. Rayuan kepada Mahkamah Persekutuan oleh Dato' Wrigglesworth juga telah ditolak, lalu mengakhiri sebarang harapan Wongs untuk mengetepikan penghakiman ingkar itu. Wongs telah mengarahkan Dato' Wrigglesworth supaya memulakan tindakan terhadap responden untuk kecuaian profesional. Selepas pendengaran tindakan itu telah berlangsung selama dua hari, responden pertama telah mengeluarkan writ subpoena terhadap Dato' Wrigglesworth supaya beliau memberi keterangan lisan bagi pihak pembela dan untuk mengemukakan dokumen. Wongs memohon untuk mengetepikan subpoena itu atas alasan bahawa: (i) Dato' Wrigglesworth tidak mempunyai pengetahuan peribadi berkenaan dengan kes kecuaian profesional itu dan tidak dapat memberi sebarang keterangan material; (ii) subpoena itu telah dibuat secara mala fide dan adalah suatu

penyalahgunaan proses mahkamah, iaitu untuk menghalang Dato' Wrigglesworth daripada terus menjadi peguambela mereka; dan (iii) suatu penukaran peguambela pada peringkat lewat itu adalah bersifat menindas.

Permohonan Wongs untuk mengetepikan subpoena itu telah ditolak dengan kos dan mereka telah membuat rayuan atas alasan bahawa keengganan hakim perbicaraan untuk mengetepikan subpoena itu dengan berkesannya telah menghalang Dato' Wrigglesworth daripada terus menjadi peguambela mereka dalam kes yang telah didengar sebahagian. Isu di hadapan mahkamah adalah: (i) betapa pentingnya keterangan yang hendak didapati oleh pihak pembela daripada Dato' Wrigglesworth; (ii) isu penindasan kerana Dato' Wrigglesworth sudah lama menjadi peguambela dan peguamcara Wongs; dan (iii) penyalahgunaan keistimewaan atau proses, memandangkan kelengahan dalam mengeluarkan subpoena selepas pendengaran telah berlangsung selama dua hari.

**Diputuskan**, membenarkan rayuan itu:

(1) Hak sesuatu pihak terhadap kehadiran saksi merupakan suatu bahagian yang amat penting dalam sistem kehakiman kita, tetapi hak itu mesti dilindungi daripada sebarang penindasan atau penyalahgunaan. Di mana tidak ada keputusan berguna yang akan dicapai oleh kehadiran seseorang saksi, subpoena itu tidak harus diberikan.

(2) Beban membukti terletak pada pihak yang mengeluarkan subpoena itu untuk menunjukkan bahawa saksi itu adalah material, iaitu ia lebih penting daripada penindasan yang mungkin diakibatkan kepada pihak yang membantah. Oleh itu, terpulanglah kepada responden untuk memuaskan mahkamah, pada imbangan, bahawa keterangan Dato' Wrigglesworth sebagai saksi mereka adalah material, sebelum hak Wongs untuk mendapatkan perkhidmatan Dato' Wrigglesworth boleh dilucutkan. Walaupun, dengan kehadiran subpoena itu, Dato' Wrigglesworth dibenarkan terus menjadi peguambela Wongs, mahkamah mesti berpuas hati bahawa Dato' Wrigglesworth berkedudukan untuk memberi keterangan yang material sebelum beliau boleh diarahkan untuk memberi keterangan untuk pihak yang lain.

(3) Satu-satunya perkara yang mungkin dalam pengetahuan peribadi Dato' Wrigglesworth dan dengan itu beliau dapat memberi keterangan mengenainya adalah keterangan fakta kolateral yang tidak relevan secara langsung kepada pemasukan penghakiman ingkar itu.

(4) Tidak terdapat pli di dalam pernyataan pembelaan untuk menunjukkan bahawa Dato' Wrigglesworth bersalah secara keseluruhan atau sebahagiannya, untuk sebarang butir kecuaian. Adalah undang-undang mantap bahawa pihak terikat kepada pliding mereka dan adalah jelas bahawa subpoena itu tidak kena-mengena dengan pembelaan seperti yang dihujahkan. Pemindaan

pembelaan sekarang, selepas selang tujuh tahun dan selepas kes ini telah didengar sebahagiannya, akan memudaratkan Wongs yang tidak dapat dipampas dengan kos.

(5) Oleh kerana ia tidak merupakan sebahagian daripada pembelaan bahawa Dato' Wrigglesworth bersalah kerana kecuaian sertaan, hakim perbicaraan seharusnya membuat keputusan bahawa, berdasarkan pliding, responden telah gagal memuaskan hati mahkamah bahawa keterangan yang mungkin diberikan oleh Dato' Wrigglesworth untuk pihak pembelaan adalah material. Kehadiran Dato' Wrigglesworth sebagai seorang saksi tidak mempunyai kepentingan selain daripada menyebabkan kejengkelan dan konfrantasi.

(6) Tidak ada penjelasan tentang kelengahan dalam mengeluarkan subpoena, dan memandangkan pengaturan masa, tidak ada sebarang keraguan bahawa subpoena itu bersifat menindas dengan tujuan mala fide untuk melucutkan Wongs akan perkhidmatan Dato' Wrigglesworth di tengah-tengah pendengaran itu. Ia adalah suatu penyalahgunaan proses dan patut diketepikan.

(7) Kegagalan subpoena itu untuk mengenal pasti dokumen yang dikehendaki dikemukakan, selepas responden pertama enggan memberi persetujuannya untuk memasukkan semua dokumen relevan di dalam ikatan dokumen yang dipersetujui, meskipun responden kedua telah bersetuju untuk memasukkannya, tidak menolong responden pertama dalam isu bona fide.

**Per curiam**:

(1) Kewajipan seseorang peguam untuk berlaku adil, jika beliau adalah seorang saksi material sesuatu kes, lebih penting daripada kewajipannya untuk mewakili anak guamnya.

(2) Jika Dato' Wrigglesworth patut dipersalahkan sepenuhnya atau sebahagiannya untuk kecuaian profesional yang dipertuduhkan oleh Wongs, dia seharusnya dicantumkan sebagai pihak kepada prosiding dan bukan hanya dipanggil sebagai seorang saksi.]

**Notes**

For a case on setting aside a subpoena, see 2 *Mallal's Digest* (4th Ed) para 2176.

For cases on calling of witnesses by the defence, see 7 *Mallal's Digest* (4th Ed) paras 1331–1333.

**Cases referred to**

1 *Raymond v Tapson* (1883) 22 Ch D 430 (refd)
2 *Re Mundell, Fenton v Cumberlege* (1883) 52 LJ Ch 756 (refd)
3 *PP v Vengadasalam & Ors* [1990] 1 MLJ 507 (folld)
4 *Emperor v Dadu Ramu* AIR 1939 Bom 150 (folld)
5 *R v Baines & Anor* [1909] 1 KB 258 (refd)
6 *Ismail v Hasnul; Abdul Ghafar v Hasnul* [1968] 1 MLJ 108 (folld)

**Legislation referred to**
Legal Profession (Practice and Etiquette) Rules 1978 r 28(a)

**Appeal from**: Civil Suit No 23–696–85 (High Court, Kota Bharu)

*Dato' Wrigglesworth* (*Wrigglesworth & Co*) for the appellants.
*Bhagwan Singh* (*Bhagwan Singh & Co*) in person.
*Robert Lazar* (*Shearn Delamore & Co*) for the second respondent.

**Mohamed Azmi SCJ** (delivering the grounds of judgment of the court): The present dispute between the appellants (hereinafter referred to as 'the Wongs') and the respondents, (hereinafter also referred to as 'the former solicitors') has its roots in 1978 when the Wongs were sued in the Kota Bharu High Court by Lian Mah Trading Agency Sdn Bhd ('the company') for general and special damages in an action for wrongful seizure and sale of goods, namely, Komatsu Angle Dozer, which the company had claimed to be the owners of. The Wongs who were then represented by the respondents, had denied the various allegations in the statement of claim, and pleaded in their defence that the Komatsu Angle Dozer actually belonged to one Syarikat Perusahaan Berangkat Sdn Bhd ('the syarikat') against whom they had the right of seizure and sale. They also pleaded waiver on the ground that the company had not filed any objection proceeding against the auction sale. When the 1978 case came up for hearing before Mohamed Zahir J on 16 May 1981, neither the Wongs nor their then counsel, Mr Bhagwan Singh (the first respondent herein) a partner of Messrs Lim Soh Wah, Bhagwan & Partners, were present, resulting in default judgment being entered against the Wongs in the total sum of RM81,000 comprising of RM65,000 for the value of the Komatsu Angle Dozer and RM16,000 as damages for loss of its use.

More than a month later, on 18 June 1981, Mr Bhagwan Singh who was then still acting for the Wongs, applied by a summons-in-chambers to set aside the default judgment. On 23 August 1981, with the consent of the former solicitors, there was a change of solicitors, whereby the Wongs had engaged Messrs Wrigglesworth & Co in place of their former solicitors. At the hearing of the application to set aside on 16 September 1981, Mohamed Zahir J, with the consent of the parties, agreed to hear the application together with a fresh application by the Wongs to extend time since the application to set aside was filed outside the seven days from the date of service of the order of default judgment, and therefore did not comply with O 35 r 2(2) of the Rules of the High Court 1980 ('the RHC'). After hearing arguments, Mohamed Zahir J dismissed both the applications. An appeal to the then Federal Court by Dato' Wrigglesworth was also dismissed, which finally put an end to any hope by the Wongs to set aside the 1981 default judgment. It was under these circumstances that the Wongs instructed Dato' Wrigglesworth to commence action against their former solicitors for professional negligence. The writ against them was filed on 22 December 1985. Hearing of the suit commenced on 5 December 1990, during which two witnesses for the Wongs gave evidence and this was followed by another two witnesses (PW3 and PW4) the next day, but before PW4 was

cross-examined, the hearing was adjourned to 23 April 1991 for continued hearing. On 14 April 1991, ie about a week before the date of continued hearing, the first respondent, on his own behalf and on behalf of the former solicitor's firm, issued a writ of subpoena ad testificandum and duces tecum under O 38 r 14 of the RHC 1980, for the Wongs' present counsel, Dato' Wrigglesworth, to give oral evidence for the defence as well as to produce documents. By a summons-in-chambers dated 3 August 1991, the Wongs applied to have the subpoena against their counsel set aside on the principal ground that Dato' Wrigglesworth did not have any personal knowledge of any facts relating to the professional negligence case and, as such, could not give any material evidence. By para 12 of the summons, it was also contended that the issue of the subpoena had been made mala fide and was an abuse of the court process, in that it had been served with a hidden motive of preventing Dato' Wrigglesworth from continuing as counsel for the Wongs in the partly heard case. Further, the Wongs contended that Dato' Wrigglesworth had been acting for them for the past ten years ever since the alleged professional negligence was committed, and as such a change of counsel at that late juncture would be oppressive. On 5 December 1991, the Wongs' application to set aside the subpoena was dismissed with costs. Hence the present appeal.

Before us, it was contended on behalf of the Wongs that, by refusing to set aside the writ of subpoena dated 14 April 1992, the learned judge had effectively prevented Dato' Wrigglesworth from continuing to be their counsel in the part-heard professional negligence case, and consequently had also the effect of forcing the Wongs to engage a new counsel after the hearing of the civil suit had already commenced for two days. We hasten to add, however, that although changing horses in mid-stream would not be recommended, the Wongs' constitutional right to be represented by Dato' Wrigglesworth as a counsel of their choice under art 5(3) of the Federal Constitution is subject to Dato' Wrigglesworth's willingness and ability to do so (see the Practice Note issued in relation to the Federal Court decision in *Palaniappa Chettiar v Arunasalam Chettiar* [1961] MLJ xxxiii). If the learned judge is correct in law in holding that Dato' Wrigglesworth is a material witness for the former solicitors, that is to say, the materiality of his evidence outweighs any oppression that might be occasioned to the Wongs, then due to the legal impediment imposed by the subpoena, Dato' Wrigglesworth cannot be said to be a counsel who is able though willing to continue to represent them throughout the litigation.

It has been said that the retainer of a solicitor is prima facie an entire contract. In our view, a solicitor is bound to see the case through even though the clients fail to pay him sufficient advances. It is his duty, if properly instructed and provided with funds out of pocket, to act for his client throughout the litigation. Generally speaking, however, the duty of a solicitor to do justice, if he is a material witness to a case, is of greater paramount than his duty to represent a client. In our opinion, that duty is the rationale behind r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 to which our attention has been drawn by both counsel. Rule 28(a) provides:

> An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. Thus in *Raymond v Tapson*,[1] it was held that any party may, without leave of the court, issue a subpoena for the examination of a witness at any stage of an action; but the court will exercise a control over the privilege to prevent it being oppressively used. In that case, the plaintiffs had subpoenaed a solicitor, who had acted for both parties in a mortgage transaction, in order to examine him with respect to the moneys received by him on account of both parties. The court held that the plaintiff was entitled to issue the subpoena and to examine the witness. But, where no useful result would be obtained by the attendance of a witness, the subpoena should be refused — see *Re Mundell, Fenton v Cumberlege*.[2] At p 452, *Mallal's Supreme Court Practice* (2nd Ed), citing *Raymond v Tapson*[1] as authority, it is stated that:

> An oppressive subpoena (for purposes of annoyance, or in spite, to a man's wife or unmarried daughters and the like) will be set aside by the court, on application on behalf of the witness, as being an abuse of the party's privilege to issue a subpoena without leave.

It is further stated at p 453 that:

> The court has inherent jurisdiction to set aside a subpoena which is issued from an improper motive and not for obtaining relevant evidence, and there is no distinction, on the point, between civil and criminal proceedings: *R v Baines* [1909] 1 KB 258.

In *PP v Vengadasalam & Ors*,[3] Lim Beng Choon J held that the onus of proof was on the prosecution to provide the court with some material that the counsel representing the accused was a material witness for the prosecution before the accused could be deprived of the services of the counsel of his choice. In the course of his judgment, Lim Beng Choon J cited the following statement of Beaumont CJ in *Emperor v Dadu Ramu*:[4]

> The question whether the court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the court or the client. If a court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the court has

A inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.

B We would with respect adopt the above statement of the law which, in our opinion, applies to both criminal and civil cases with equal force. In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting. Thus, in the present C appeal, it was for the former solicitors to satisfy the court, on balance, of the materiality of the evidence of Dato' Wrigglesworth as their witness, before the Wongs could be deprived of their right to the services of Dato' Wrigglesworth. Even if it was permissible for Dato' Wrigglesworth, notwithstanding the subpoena, to continue as counsel for the Wongs, in our view it would still be imperative for the court to be satisfied that D Dato' Wrigglesworth was in a position to give material evidence in the case, before he, as counsel for the Wongs, could be ordered to give evidence for the opposite side.

The first question for determination in this appeal was whether the learned judge had stated the correct legal principles, and secondly, whether E he had properly applied the law to the facts of the case, before refusing to set aside the subpoena. In other words, had the learned judge sufficiently considered, firstly, the issue of materiality of the evidence to be elicited by the defence from Dato' Wrigglesworth; secondly, the issue of oppression since Dato' Wrigglesworth had been a long-standing solicitor and counsel for the Wongs; and thirdly, the issue of abuse of privilege or process, in the F light of the delay in issuing the subpoena after the hearing had commenced for two days.

From pp 4 and 5 of his grounds of judgment, the learned trial judge was clearly aware of the correct principles when he stated that, although a litigant was entitled to serve a subpoena on anyone as a witness, the court G had inherent jurisdictions to set it aside if it was an abuse of process of the court or not made bona fide for the purpose of obtaining relevant evidence and that the witness was, in fact, unable to give relevant evidence. His Lordship referred to the case of *R v Baines & Anor*,[5] where the attendance of the witness was required only for confrontation and, therefore, was an abuse of the privilege. He also considered the decision of the Federal Court H in *Ismail v Hasnul; Abdul Ghafar v Hasnul*,[6] where it was held that:

(1) ... The evidence which the respondent was seeking to establish was evidence of collateral facts not reasonably conclusive even if established, and which have no connection with the main fact in the defamation suit. It was therefore, not apparent in what way the appellants could give any relevant I evidence to assist the defence;

(2) ... In the particular circumstances of this particular case the court has a right to protect the appellants from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice.

In that case, Raja Azlan Shah J (as His Majesty then was) also held: A

> ... But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.

Save for their application, we were satisfied that the learned judge had stated the correct principles, in particular the need for the party issuing and serving the subpoena to show to the court in what way the person served B with the subpoena could give any relevant evidence. It is not, therefore, sufficient merely to show that the person is an advocate and solicitor in the case, because merely holding such [a] position does not, ipso facto, credit him with personal knowledge of relevant evidence on which he can testify as such evidence is invariably hearsay evidence or privileged communication C between solicitor and client.

In his grounds of judgment, the learned judge had reproduced all the 12 grounds advanced by the Wongs in their summons-in-chambers for setting aside the subpoena. His Lordship had, however, concluded that only the following three matters were relevant for the purpose of determining the D materiality of Dato' Wrigglesworth's evidence:

(i) Failure of Mr Bhagwan Singh to appear in court on 16 May 1981 before Mohamed Zahir J in Civil Suit No 148–1978.
(ii) Failure of Mr Bhagwan Singh to set aside the default judgment within time limit.
(iii) Failure of Mr Bhagwan Singh to apply for extension of time to file the E application to set aside the default judgment.

Although the learned judge held that Dato' Wrigglesworth could not give material evidence on (i), viz the failure of Mr Bhagwan Singh to appear, his Lordship was satisfied that as regards matters (ii) and (iii), viz the failure to F set aside and to apply for extension of time, Dato' Wrigglesworth as the new solicitor, was in a position to remedy the procedural defects, and therefore, could give material evidence on them. The learned judge seemed to attach considerable blame on Dato' Wrigglesworth for the delay in filing the application to set aside the default judgment, and also for filing an inadequate affidavit in support of the application for extension of time. In our opinion, G if Dato' Wrigglesworth were to be blamed wholly or partly for the professional negligence alleged by the Wongs, then he should properly be joined as a party in the proceedings and not merely called as a witness.

For the determination of this appeal, it is important to identify the particulars of professional negligence alleged by the Wongs against their H former solicitors. In the circumstances of the case, the learned judge ought to have relied more on the particulars of negligence pleaded in the statement of claim to determine materiality rather than on the three matters which he himself had thought to be relevant matters. On close scrutiny, they are not exactly the same. The professional negligence pleaded in para 3 of the statement of claim refers specifically to three particulars, namely: I

(i) Failing to inform the plaintiffs [the Wongs] of the date of trial of Kota Bharu High Court Civil Suit No 148 of 1978 in which the plaintiffs

were the defendants and the above-named defendants [the respondents] were the solicitors of the plaintiffs.

(ii) Failing to appear at the trial of the said civil suit in the High Court at Kota Bharu on the date fixed for the trial, namely on 16 May 1981.

(iii) Failing to apply in time to set aside the order made by the court on 16 May 1981 in default of the appearance of the defendants at the hearing of the said suit.

In our view, particulars of negligence against the former solicitors in (i) on failure to inform and (ii) on failure to appear, are clearly the direct cause of the entry of default judgment against the Wongs. The third particulars of negligence under (iii) on failure to apply to set aside is merely consequential or collateral to the entry of the judgment. From the arguments before us, it is obvious that Dato' Wrigglesworth could not possibly give any material evidence on (i) and (ii), ie on the alleged failure of Mr Bhagwan Singh to inform the Wongs the date of trial, and the alleged failure of Mr Bhagwan Singh himself to be present at the trial on 16 May 1981. Thus, the only matter on which Dato' Wrigglesworth could possibly have personal knowledge of and therefore could testify to is (iii), on evidence of collateral facts not directly relevant to the entry of the default judgment.

Further, when the summons-in-chambers to set aside the default judgment was filed on 18 June 1981, the former solicitors were still acting for the Wongs. The notice of change of solicitors was only filed on 23 August 1981. These relevant dates had been confirmed by Mohamed Zahir J in his grounds of judgment when dismissing the Wongs' application in Civil Suit No 148 of 1978. It is therefore not apparent in what way Dato' Wrigglesworth could give any relevant evidence to assist the former solicitors for not filing the summons to set aside within time. It is true that Dato' Wrigglesworth did make a late attempt to apply for extension of time on 16 September 1981 to rectify the late filing of the application to set aside by Mr Bhagwan Singh, but the particulars of negligence pleaded under para 3(iii) is against Mr Bhagwan Singh's late filing of the summons to set aside the default judgment, and not against Dato' Wrigglesworth last minute attempt to rectify the late filing by the application for extension of time.

But, what is more crucial is the admission made before us by Mr Bhagwan Singh that there is no plea in the statement of defence to indicate that Dato' Wrigglesworth is either wholly or partly to blame for any of the three particulars of negligence. It is trite law that parties are bound by their pleadings and, on that basis, it is apparent that the reason for the subpoena on Dato' Wrigglesworth as a witness for the former solicitors has nothing to do with the defence as pleaded. The defence was filed on 16 June 1986 and it must be accepted that amending the statement of defence now, after a lapse of seven years and after the case had been partly heard, would prejudice the Wongs which cannot be compensated by costs.

As it is not part of the defence that Dato' Wrigglesworth is guilty of any contributory negligence, we are satisfied, having regard to all the circumstances, that the learned judge ought to have come to the conclusion that on the pleadings, the former solicitors had failed to satisfy the court on

the materiality of the evidence that Dato' Wrigglesworth could possibly offer to the defence. In our view, save for annoyance and confrontation, no useful purpose would be obtained by the attendance of Dato' Wrigglesworth as a witness. Further, there is no explanation for the delay in the issue of the subpoena, notwithstanding the notice given earlier, and having regard to its timing, there could be no doubt, on balance, that it was an oppressive subpoena, with a mala fide motive of depriving the Wongs of the services of Dato' Wrigglesworth in the middle of the hearing. In the circumstances, the subpoena was an abuse of process and as such the court had a duty to set it aside. In addition, the failure of the subpoena to identify the documents to be produced, particularly after consent was withheld by Mr Bhagwan Singh to the inclusion of all relevant documents in the agreed bundle of documents notwithstanding the agreement already given by the second respondent to such inclusion, did not assist Mr Bhagwan Singh at all on the issue of bona fide.

As a matter of record, Mr Robert Lazar who appeared for the second respondent had indicated to us that his client did not oppose this appeal.

Accordingly, we allowed the appeal and set aside the order of the learned judge. The application to set aside the subpoena must be allowed. Costs to the appellants, both here and in the court below, against the first respondent, and no order as to costs against the second respondent. The deposit was refunded to the appellants.

*Appeal allowed.*

Reported by Prof Ahmad Ibrahim